STATE OF MICHIGAN

IN THE SUPREME COURT

KAITLIN HAHN,

Plaintiff-Appellee,

v

GEICO INDEMNITY COMPANY,

Defendant-Appellant,

and

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant.
_____/

Supreme Court No. 158141

Court of Appeals No. 336583

Oakland County Circuit Court
No. 16-152229-NI

DEFENDANT-APPELLANT GEICO INDEMNITY COMPANY'S BRIEF IN REPLY TO PLAINTIFF-APPELLEE'S ANSWER TO THE APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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INTRODUCTION

This case involves a North Carolina insurance policy issued by Defendant-Appellant, GEICO Indemnity Company. By its terms, the contract obligates GEICO to provide coverages mandated by North Carolina automobile insurance law. Not surprisingly, it does not provide for payment of Michigan no-fault insurance benefits, as it is a North Carolina policy, written on a vehicle registered in North Carolina and required to have North Carolina coverage; it is not a Michigan no-fault policy.

Yet since GEICO is authorized to do business not only in North Carolina and other states but also in Michigan, there is one circumstance in which a non-Michigan policy it issues nevertheless can be the basis for compelling it to pay Michigan benefits "as if it were an insurer of personal and property protection insurance." MCL 500.3163(3). That circumstance is when the accident occurs in Michigan and involves a vehicle owned or operated by *a non-resident of Michigan* who is insured under the non-Michigan policy. MCL 500.3163(1).

In this case, it is undisputed that neither the terms of Zachary Waller's North Carolina policy *nor* GEICO's §3163-certification apply to mandate payment of Michigan no-fault benefits to Plaintiff-Appellee Hahn. The question presented is whether the holding in *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1998), and its interpretation of MCL 500.3012, constitutes a legally viable alternative means for imposing Michigan no-fault coverage on the issuer of a non-Michigan policy. GEICO's application to this Court has shown that it does not.

Yet the trial court applied the *Farm Bureau*/§3012 theory to deny GEICO's summary disposition motion; and in affirming, the Court of Appeals concluded that *Farm Bureau* constitutes binding precedent under MCR 7.215(J)(1). Plaintiff now contends that the legal validity of *Farm Bureau*'s §3012-based reformation rule should escape this Court's review on grounds that it was not timely raised below. For the reasons that follow, this contention should be rejected. Plaintiff then attempts to justify the *Farm Bureau* rule itself, but never overcomes–indeed, never addresses–the

fatal lack of textual support in MCL 500.3012 for the construction afforded it in *Farm Bureau*. Under both MCR 7.305(B)(3) and MCR 7.305(B)(5)(a), the Court is respectfully urged to grant review in this case to examine the validity of the *Farm Bureau* reformation rule.

REPLY ARGUMENT

I. The pure issue of law presented in GEICO's Application, fully briefed and argued in the Court of Appeals and resulting in a holding that the *Farm Bureau* reformation rule constitutes binding precedent, is properly before the Court for review.

As her first argument in opposition to the instant leave application, Plaintiff contends that the issue GEICO presents was not preserved and thus is not properly before the Court. The Court should deny leave to appeal, Plaintiff asserts, because GEICO did not timely raise in the lower courts its argument that the *Farm Bureau* holding is invalid and should be overruled. Plaintiff's assertions are overstated, however, and do not support denial of GEICO's application.

GEICO contends that Michigan law does not authorize courts to transform a non-Michigan auto policy into a Michigan no-fault insurance policy (absent application of MCL 500.3163, which indisputably does not apply here), and that the Court of Appeals' opinion to the contrary, purporting to find such authority in MCL 500.3012, is insupportable. This question is properly raised for Supreme Court review, GEICO submits, where our Court of Appeals directly held that the *Farm Bureau* holding applies to this case and constitutes the binding precedent on which this case will be decided.[1]

Plaintiff asserts that the Supreme Court "will not consider an issue the appellant failed to properly raise and preserve in the Court of Appeals or trial court," citing *People v Smith*, 420 Mich

[1] *Hahn v GEICO Indemnity Co*, unpublished Court of Appeals opinion No. 336583, June 12, 2018, slip op at 6 (Exhibit 1 to GEICO's Application for Leave to Appeal).

1, 11 n 3; 360 NW2d 841 (1984); *Long v Pettinato*, 394 Mich 343, 349; 230 NW2d 550 (1975); and *Kushay v Sexton Dairy Co*, 394 Mich 69, 77; 228 NW2d 205 (1974),[2] yet this overstates the rule. In *People v Smith*, *supra*, the asserted legal issue, although not raised in the trial court, *was* accepted for Supreme Court review. Stating that "[n]ormally, this Court will not consider issues not raised both in the trial court and the Court of Appeals," *Smith*, 420 Mich at 1, 11 n 3, the Court nevertheless went on to conclude that the issue presented (concerning the defendant's "standing" to challenge a search and seizure) *was* proper for Supreme Court review given that it had been raised in the Court of Appeals and because resolution of the issue was "necessary for a proper determination of the case." *Id*. The very same is true in the case at bar.

The other two cases Plaintiff cites, in which the Court declined to review certain issues, are materially distinguishable. In *Long v Pettinato*, *supra*, the principal issue before the Court was whether the plaintiffs' auto negligence claim was governed by Michigan's three-year statute of limitations or Ontario's twelve-month statute of limitations. Early in the case the trial court apparently had granted a motion to set aside an entry of default, but this issue–entirely separate from the key statute of limitations question–was never raised by the plaintiffs until they were in the Supreme Court. Because this claim of error "was not raised before the Court of Appeals," the Supreme Court said, "we decline to consider it here." *Id*., 394 Mich at 349.

Similarly, the issue reviewed in *Kushay v Sexton Dairy Co*, *supra*, was whether a workers' compensation claimant could recover benefits for home-care services provided by a spouse, notwithstanding that a conscientious spouse might perform such services even without pay. This issue was properly raised by the plaintiff-appellant; but in the Supreme Court *the defendant-appellee* sought to raise brand new procedural defenses (the worker's compensation "one-year back" rule and

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[2] Plaintiff-Appellee's Answer to the Application for Leave to Appeal (12/11/2018, pp. vii and 15.

a "three year limitation" rule), which were never presented to the trial magistrate, the Appeal Board, or the Court of Appeals. Not surprisingly, this Court held that the defendant "failed properly to preserve these issues." *Id*., 394 Mich at 77.

The instant case is conclusively different. As both lower courts observed, Plaintiff's claim against GEICO is based entirely on the notion that *Farm Bureau*'s §3012 reformation rule provides Plaintiff with a viable claim for unlimited Michigan no-fault benefits.[3] The issue of whether this reformation rule is legally unfounded but nevertheless is binding on the lower courts as controlling precedent was fully presented in GEICO's Brief on Appeal, but the Court of Appeals regarded GEICO's arguments as not timely raised in the preceding leave application. *Yet the court nevertheless proceeded to address them*:

> In any event, were these questions properly before us, we would reach the same conclusion. ... [T]he *Farm Bureau Ins Co* Court's holding with respect to MCL 500.3012 is not obiter dictum. We therefore decline Geico's invitation to not follow binding precedent of this Court with respect to MCL 500.3012.

Hahn, slip op at 6 (Exhibit 1 to GEICO's Application for Leave to Appeal).[4]

This action is now proceeding exclusively on the notion that the §3012 reformation rule under *Farm Bureau* provides Plaintiff with a viable claim for unlimited Michigan PIP benefits from

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[3] Opinion & Order, 1/10/2017, pp. 31-33 (Exhibit 2 to GEICO's Application for Leave to Appeal) (concluding that under §3012 Plaintiff has a potentially viable claim that Waller's North Carolina policy should be deemed to provide Michigan no-fault coverage); *Hahn*, Court of Appeals' slip op at 5 (Exhibit 1 to GEICO's Application for Leave to Appeal) (relying on *Farm Bureau* to hold that Plaintiff's asserted facts, if proven, will trigger "applicability of MCL 500.3012").

[4] Even if this central, controlling issue in the case was not properly raised below, it is nevertheless well recognized that the appellate courts may overlook preservation requirements if failure to consider an issue will result in manifest injustice or consideration is necessary for a proper determination of the case, particularly if the issue involves a question of law and the facts necessary for its resolution have been presented. *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011); *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000); *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640-641; 734 NW2d 217 (2007). All of these conditions are clearly met in this case.

a North Carolina insurance policy. The trial court so held, and the Court of Appeals affirmed on the basis that *Farm Bureau*'s construction of §3012 constitutes binding precedent on the Court of Appeals and lower courts under MCR 7.215(J)(1). The issue presented is purely one of law; and its resolution unquestionably is necessary both for a proper determination of this case and, more broadly, to clarify the statutory obligations of all Michigan-authorized insurers who rely on statutory mandates to properly assess risks and maintain premiums accordingly. The Court thus should grant review to address these issues.

II. Plaintiff's myriad attempts to justify the *Farm Bureau* reformation rule as legally well-founded conclusively fail and only reinforce GEICO's contention that Supreme Court review in this case is warranted.

The rule of law being challenged, succinctly stated by Plaintiff at the beginning of her argument on the merits, is that an out-of-state insurance policy issued by a 3163-certified insurer "must be reformed to provide Michigan PIP coverage under MCL 500.3012" if the insurer had notice that the insured is a Michigan resident. (Plaintiff's Answer, heading B.1, p. 16). Otherwise, since the fundamental premise of the rule propounded by *Farm Bureau* is that any policy issued under such circumstances "purport[s] to be a Michigan policy that complies with Michigan law," *Farm Bureau*, 233 Mich App at 41, such a policy would "violate[] Michigan law," *id*., and would necessarily "be issued in violation of' the no-fault act." *Id*., at 42. And according to *Farm Bureau*'s dissenting opinion, on which Plaintiff also relies, any such policy would constitute "an illegal contract for automobile insurance." *Id*., at 45-46 (Griffin, J., dissenting).

Applying these tenets to the case at bar, Plaintiff relies on the proposition that Waller, as a Michigan resident, was required to maintain Michigan no-fault insurance and that GEICO, as the issuer of the North Carolina auto policy Waller purchased, was thus "required" by the Michigan no-

fault act "to provide Zach Waller mandatory Michigan PIP coverage." (Plaintiff's Answer, p. 25, heading B.4). Plaintiff's defense of the *Farm Bureau* reformation rule thus necessarily relies on these propositions; yet they fundamentally lack merit.

Plaintiff cites *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525 n 3; 502 NW2d 310 (1993), for the unremarkable principle that since Michigan PIP benefits are mandated by statute, any Michigan PIP policy must be read and construed with the provisions of the act as though they were a part of the contract; the act is the "rule book" for such policies. (Plaintiff's Answer, pp. 23, 30). Similarly, Plaintiff relies on *Farm Bureau*'s discussion of *Blakeslee v Farm Bureau Mut Ins Co*, 388 Mich 464, 474; 201 NW2d 786 (1972), which also involved a Michigan auto policy. *Blakeslee* concerned a coordination of benefits provision that, if allowed, would have reduced the policy's uninsured motorist coverage (which at that time was mandatory) below what the statute required. *In that context*, the Court said that "[i]t would be unconscionable to permit an insurance company *offering statutorily required coverage* to collect premiums for it with one hand and allow it to take the coverage away with the other by using a self-devised 'other insurance' limitation." *Blakeslee*, at 474, as quoted in *Farm Bureau*, 233 Mich App at 42 (Plaintiff's Answer, pp. 17-18).

In other words, where an insurance policy actually *does* purport to be a Michigan no-fault policy, the no-fault act is properly regarded as the "rule book" for dictating what coverage is provided. The act itself so states.[5] Yet Plaintiff can cite no authority (other than *Farm Bureau* itself and its flawed reliance on MCL 500.3012) for imposing Michigan no-fault coverage on a *North Carolina* auto policy purporting to be nothing other than a North Carolina policy complying with North Carolina law. GEICO has shown that the North Carolina insurance policy Waller purchased

[5] MCL 500.3101(3) ("A policy of insurance *represented or sold as providing* [the PIP, PPI and residual liability coverages described in MCL 500.3101(1)] is considered to provide insurance for the payment of the benefits") (emphasis added).

was absolutely necessary for Waller to comply with North Carolina law. The State of Michigan could have no conceivable interest–and none of its statutes suggest otherwise–in invalidating or reforming a contract of insurance that is perfectly legal and statutorily mandated.

To be sure, with respect to motor vehicles required to be registered in Michigan, the no-fault act imposes on owners of such vehicles the obligation to maintain Michigan insurance coverages–PIP, PPI and residual liability insurance. MCL 500.3101(1). Plaintiff asserts that this "mandatory PIP coverage requirement" is repeated in the Vehicle Code at MCL 257.216 (Plaintiff's Answer, p. 27); yet MCL 257.216 and its related provisions do not address insurance at all. They merely designate what vehicles must be registered in Michigan; and Waller's vehicle was, in fact, *not* registered in Michigan but in North Carolina–as mandated by North Carolina law by virtue of Waller being stationed on active duty status in North Carolina.[6]

Yet relying on the *Farm Bureau*/§3012 reformation rule, Plaintiff argues that "[GEICO] *had to provide* Michigan PIP coverage" to Waller (Plaintiff's Answer, p. 32 n 22). This simply is not so. *If* Waller was also obligated under Michigan law to register and insure his vehicle in Michigan–notwithstanding that he *properly* registered and insured it in North Carolina–then it was incumbent on him to do so; and, indeed, he could just as well have done so separately, as nothing compelled him to purchase his no-fault coverage from GEICO or include it on his North Carolina policy.

Plaintiff cites no authority for the proposition that the State of Michigan may impose on an insurer in North Carolina (even one also authorized to do business in Michigan) a duty to second-guess its customer and, despite the absence of any such request, provide Michigan no-fault coverage

[6] See GEICO's Application for Leave to Appeal, 7/24/2018, p. 7 n 1 (detailing that, under the North Carolina statutes and case law cited, Waller's circumstances mandated that he register his vehicle in North Carolina and insure it with North Carolina insurance).

when it was not purchased.[7] Manifestly, since Waller was required under North Carolina law to insure his vehicle with North Carolina insurance and both he and GEICO acted to meet this requirement, the policy can hardly be deemed an "illegal contract" or one whose issuance "violated Michigan law."[8]

Plaintiff also attempts to reduce GEICO's argument to the simplistic proposition that "MCL 500.3012 governs only 'liability insurance' policies and is not applicable to automobile insurance policies issued under the No-Fault Act." (Plaintiff's Answer, p. 26; *accord*, *id*., pp. 27-28). The assertion is merely a smoke-screen thrown up to hide Plaintiff's inability to deny that the terms of MCL 500.3012, and the preceding sections it incorporates, have no application whatsoever to an automobile insurance policy issued in North Carolina under North Carolina law. GEICO has no problem acknowledging that the statutes at MCL 500.3004 through MCL 500.3012 apply to "liability insurance policies" issued or delivered in Michigan and thus naturally apply to Michigan

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[7] Briefly addressing GEICO's discussion of *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999), Plaintiff dodges the point entirely by marginalizing the issue to whether non-Michigan insurance agents must investigate each customer to determine whether they are in fact a resident of Michigan (Plaintiff's Answer, pp. 18 n 14, and 33). GEICO's point was not concerned merely with an agent's potential obligation to confirm a customer's home state. The concern, rather, is with *Farm Bureau*'s fabrication of a law that would require a non-Michigan agent not merely to issue the insurance policy being requested in compliance with the law of the state in which it is being issued, but (a) to *know* the insurance laws of that customer's home state (wherever it might be, as the insurer may be authorized to do business in numerous states) *and* (b) to counsel the customer regarding their insurance needs, whether asked to do so or not, and insist that they purchase more or different coverage than what was requested. *Harts* directly rejects such a duty.

Yet the more pertinent question–even if one were to regard such an expansive duty as good public policy after duly considering the competing interests–is whether the Court of Appeals in *Farm Bureau* was empowered to create this duty. It purported to find its source in MCL 500.3012, but as GEICO has shown, that statute provides no such authority.

[8] Plaintiff cites MCL 500.3102(2), and quotes the dissenting opinion in *Farm Bureau*, at 43 (Griffin, J., dissenting) (Plaintiff's Answer, pp. 24, 30) for the proposition that the Indiana policy in that case subjected the insured to misdemeanor criminal liability. This is fundamentally inaccurate. What might have exposed the insured to criminal liability is *not* the fact that the Indiana policy she purchased did not provide Michigan no-fault coverage, but *her* failure to purchase a policy that *did* provide such coverage.

no-fault policies since those are policies that provide liability insurance. But this point neither advances Plaintiff's position nor lends any support to the *Farm Bureau* holding.

One policy to which the terms of §§3004-3012 explicitly do *not* apply is an auto insurance policy issued in North Carolina; and one thing the terms of §§3004-3012 do *not* purport to do, regardless of which insurance policies they address, is deem any policy reformed to include anything *other than* (1) a provision advising that the insurer will remain responsible for payment despite an insured's bankruptcy or insolvency (§3012, incorporating §3004 and §3006); (2) a provision advising that "notice" to an insurer's authorized agent shall constitute notice to the insurer, and that notice deadlines shall be subject to an "as soon as reasonable possible" exception (§3012, incorporating §3004 and §3008); (3) a provision in auto liability policies providing at least $20,000/$40,000 in bodily injury liability coverage and at least $10,000 in property damage liability coverage (§3012, incorporating §3009(1); and (4) a provision generally requiring insureds to report certain fire or explosion losses to law enforcement authorities (§3012, incorporating §3010 and §3011).

In short, contrary to the Court of Appeals' holding in *Farm Bureau* and to the very foundation of Plaintiff's instant claim, MCL 500.3012 and the provisions it references do *not* impose Michigan no-fault PIP coverage on *any* insurance policy, let alone one issued in another state in compliance with the laws of that other state. Left without any statutory support for its reformation theory, Plaintiff places great weight on a brief passage in the *Farm Bureau* dissenting opinion, twice quoted by Plaintiff with underlined emphasis:

> [I]t is an utterly "incongruous result ... that an automobile insurance policy issued to an out-of-state resident must be reformed to comply with Michigan law (under MCL 500.3163) while a policy issued to a Michigan resident need not."

Farm Bureau, 233 Mich App at 47 (Griffin, J., dissenting) (quoted in Plaintiff's Answer, pp. 19, 35). What Plaintiff and the dissenting opinion itself both fail to acknowledge and overcome is the fact

that, while in the case of the former there is a statute dictating such reformation (MCL 500.3163); in the case of the latter there is none.

Thus, notwithstanding Plaintiff's insistence that the *Farm Bureau* court "did not engage in judicial legislation," (Plaintiff's Answer, p. 29), there can be no other way to describe the §3012 reformation rule it espoused. (*See*, GEICO's Application, pp. 23-24). Yet illegitimate as it is, the rule now is accepted as binding precedent in Michigan. This Court is respectfully urged to grant leave to appeal and ultimately declare the rule invalid.

RELIEF REQUESTED

For all the foregoing reasons and those more fully detailed in its principal application brief, Defendant-Appellant, GEICO Indemnity Company, respectfully requests that this Honorable Court grant leave to appeal in this matter or, in lieu thereof, on a peremptory basis, reverse the judgments of the lower courts and direct that summary disposition be granted in favor of GEICO.

Respectfully submitted,

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/s/ Daniel S. Saylor

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PROOF OF SERVICE

DANIEL S. SAYLOR, certifies that he is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for GEICO Indemnity Company; and that on **January 29, 2019**, he served a copy of the **Defendant-Appellant GEICO's Brief in Reply to Plaintiff-Appellee's Answer to the Application for Leave to Appeal**, and this **Proof of Service**, upon counsel for Plaintiff-Appellee by directing the Court's *TrueFiling* system to deliver true copies via "e-Service" to **Donald M. Fulkerson, Esq.**, P.O. Box 85395, Westland, MI 48185, donfulkerson@comcast.net, and to **Nicholas S. Andrews, Esq.**, Liss, Seder & Andrews, P.C., 39400 Woodward Avenue, Ste. 200, Bloomfield Hills, MI 4830, nandrews@lissfirm.com.

/s/ Daniel S. Saylor
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